

APR-02-98 14:02 From: STEPTOE & JOHNSON

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APPENDIX 1

**THE CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION
THE PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION
THE TELECOMMUNICATIONS INDUSTRY ASSOCIATION
THE UNITED STATES TELEPHONE ASSOCIATION**

March 20, 1998

The Honorable Janet Reno
U.S. Department of Justice
Tenth and Constitution Avenue, N.W.
Washington, DC 20530

Dear Attorney General Reno:

Thank you for your recent letter, clarifying several issues raised at our last meeting with Assistant Attorney General Steve Colgate and the FBI. We gladly accept your offer of further clarification on the FBI's Final Notice of Capacity.

We are concerned, however, at other remaining divisions between industry and the Department of Justice — particularly the FBI's insistence that the compliance deadline will only be extended for carriers that agree to provide all nine of the "punchlist" items as well as the Bureau's failure to recognize that compliance is not reasonably achievable within the current statutory deadline for currently installed or deployed technologies.

It is unreasonable to ask industry to pursue implementation of the punchlist features at this time when neither the FBI nor the Enhanced Surveillance Standard (ESS) Committee has developed detailed and standardized specifications for these requirements. This is, in essence, a demand that if industry wants an extension it must abandon its deeply held views about what features CALEA requires. Finally, failure to deem currently installed or deployed technologies in compliance will shift costs unreasonably to industry and impose competitive disadvantages between different carriers and technologies.

For these reasons, we would understand if you decide, as you have previously indicated, that the best resolution of this issue is to request a binding determination from the Federal Communications Commission. Such a request will not affect industry's willingness to participate in either the 60-day pricing exercise discussed at our meeting on Friday, March 6, 1998, the on-going ESS effort, or industry's commitment to develop CALEA solutions for future technologies.

We appreciate your continued personal involvement in these efforts and hope that an efficient implementation of CALEA will soon be possible.

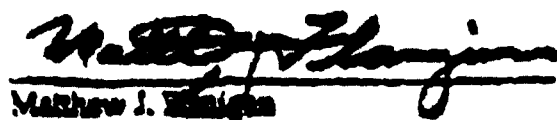
Sincerely,



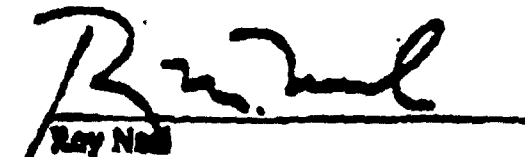
Thomas L. Wheeler
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Jay Kitchin
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Matthew J. Whalen
President
The Telecommunications Industry
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Roy Neil
President
The United States Telephone
Association

APPENDIX 2

TESTIMONY OF

MATTHEW J. FLANIGAN

PRESIDENT,

TELECOMMUNICATIONS INDUSTRY ASSOCIATION

**BEFORE THE CRIME SUBCOMMITTEE OF
THE HOUSE COMMITTEE ON THE JUDICIARY**

October 23, 1997

A. Introduction

Thank you Mr. Chairman for giving me the opportunity to appear before you and the other distinguished members of your committee. No one can dispute that these hearings are timely and necessary. My appearance today is on behalf of the members of the Telecommunications Industry Association ("TIA"). TIA represents more than 600 United States companies that manufacture and supply the equipment that is the backbone of the telecommunications industry -- from switches for landline, cellular, PCS and satellite systems to pagers to two-way radios.

Implementation of the Communications Assistance for Law Enforcement Act of 1994 ("CALEA") is at an impasse that industry and government have not been able to break. Congress intended that most of the implementation of the act would have occurred by the act's fourth anniversary, October 25, 1998. Regrettably, for the reasons I will discuss below, that deadline cannot be met.

I am pleased to report, however, that in the past week manufacturers have received a number of promising signals from the FBI. After several months of being excluded from meetings, last week TIA and several manufacturers were contacted by Mike Warren, the new section head for the CALEA Implementation Section at the FBI. He asked for a series of meetings and has offered to enter into good faith negotiations with the manufacturers, with the hope of achieving an agreement on CALEA's capability requirements.

Unfortunately, this is not the first time that such an appeal has been made by the FBI. In many ways, the FBI's current request is reminiscent of those we received when we first began the standards process in early 1995, immediately after the passage of CALEA.

At that time, the FBI approached TIA and asked, understandably, to be involved in the standards process. TIA was glad to welcome the FBI into the process, hoping that with the constructive participation of law enforcement we would be able to arrive at a standard that was

acceptable to all parties. Indeed, as reflected in our Engineering Manual, TIA has always encouraged the active participation of government entities in our standards process.

Unfortunately, our attempts to avoid confrontation and at good faith negotiation with law enforcement have put us where we are today: a year away from the compliance deadline and still without a standard to which to build.

B. The Standards Process

As the president of TIA, I am in a unique position to comment on the industry standards process and how we arrived at our current situation. TIA, as an institution accredited by the American National Standards Institute (ANSI), was selected by the telecommunications industry to promulgate the industry's CALEA standard.

Upon passage of CALEA, TIA promptly initiated a standards program. TIA set an ambitious schedule -- hoping to complete the standard on an extremely expedited basis. Although there were some substantive disagreements within industry (as there always are in a standards process), these were resolved on a fairly rapid basis.

Disagreements with the FBI, however, were not so easily resolved. It gradually became apparent that law enforcement and industry had markedly different interpretations of what was required under CALEA.

In retrospect, we should have done what CALEA provides: passed the features on which industry agreed as the industry "safe harbor" standard and told the FBI that if it considered this standard to be deficient it should challenge the standard at the FCC. Instead, however, we accepted repeated FBI requests for more consultation, more meetings, and more drafts -- all in the hopes of arriving at some acceptable middle ground where the FBI and industry could reach consensus.

In fact, for the past two and a half years, a vast majority of the standards meetings were devoted to addressing law enforcement's concerns and seeking such an agreement.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Petition for the Extension of the)
Compliance Date under Section 107)
of the Communications Assistance)
for Law Enforcement Act)
by AT&T Wireless Services, Inc.,)
Lucent Technologies Inc., and)
Ericsson Inc.)

To: The Commission

PETITION FOR EXTENSION OF COMPLIANCE DATE

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SUMMARY

AT&T Wireless Services, Inc., ("AWS"), Lucent Technologies Inc., ("Lucent") and Ericsson Inc. ("Ericsson") bring this petition under Section 107(c) of the Communications Assistance for Law Enforcement Act ("CALEA"), 47 U.S.C. §§ 1001 et seq., seeking an extension of CALEA's October 25, 1998, compliance date to at least October 24, 2000, because CALEA-compliant hardware and software will not be available within the compliance period.

This extension request is urgent. Further development of a CALEA solution in the face of the unstable industry standard would expose the vendors to potentially enormous expense of money and engineering resources because any modification to the existing industry standard could require significant changes in Lucent's or Ericsson's individual CALEA solution. Given the current stage of development, both Lucent and Ericsson will soon reach a "point of no return" whereby development commitments toward the existing standard will become irreversible. Thus, AWS and its vendors require an immediate response to this extension request.

Accordingly, AWS, Lucent and Ericsson request that the Commission grant the extension as soon as possible, effective October 25, 1998, for the full 2-year period.

In the Matter of

Petition for the Extension of the
Compliance Date under Section 107
of the Communications Assistance
for Law Enforcement Act
by AT&T Wireless Services, Inc.,
Lucent Technologies Inc., and
Ericsson Inc.

PETITION FOR EXTENSION OF COMPLIANCE DATE

I. BACKGROUND

AWS is a wholly-owned subsidiary of AT&T Corporation and is the leading provider of wireless communications services in the United States. AWS is a "telecommunications carrier" as

that term is defined in Section 102(8) of CALEA. 47 U.S.C. § 1001(8)(B)(i) ("a person or entity engaged in providing commercial mobile radio service (as defined in section 332(d) of the Communications Act of 1934 (47 U.S.C. § 332(d)))"). As such, AWS is obligated to meet the assistance capability requirements of Section 103 of CALEA for equipment, services or facilities installed or deployed after January 1, 1995.

To meet these obligations, AWS must consult, as necessary, in a timely fashion, "with manufacturers of its telecommunications transmission and switching equipment and its providers of telecommunications support services." See 47 U.S.C. § 1005(a). AWS has done so on a continuous basis since it first proposed the standardization of electronic surveillance requirements in 1995 under the auspices of the Telecommunications Industry Association ("TIA").¹

Lucent Technologies designs, builds and delivers a wide range of public and private networks, communications systems and software, data networking systems, business telephone systems and microelectronic components. Lucent is one of AWS's telecommunications equipment manufacturers. Lucent has participated in the standards process from the outset in order to make available, on a reasonably timely basis and at a

¹ AWS took the industry lead in proposing the standardization of electronic surveillance requirements with the full support and encouragement of law enforcement. AWS also provided the chair of the ad hoc subcommittee. Finally, AWS, by letter agreement with the

reasonable charge, such features or modifications as are necessary to permit AWS to meet CALEA's assistance capability requirements.

Ericsson designs, builds and delivers a wide range of public and private networks, communications systems and software, data networking systems, business telephone systems and microelectronic components. Ericsson is one of AWS's telecommunications equipment manufacturers. Ericsson has participated in the standards process from the outset in order to make available, on a reasonably timely basis and at a reasonable charge, such features or modifications as are necessary to permit AWS to meet CALEA's assistance capability requirements.

B. The Industry Standard

The Commission is well aware of the history of the development of the industry standard and its adoption on November 20, 1997, as an interim standard.² The Commission also knows that the Federal Bureau of Investigation ("FBI") has long claimed that the standard is deficient because it

Department of Justice, funded the editorial function until CALEA funds became available to reimburse AWS (which has yet to occur).

² See In the Matter of Communications Assistance for Law Enforcement Act, Notice of Proposed Rulemaking, CC Docket No. 97-213, FCC 97-356, released October 10, 1997 [hereinafter "FCC NPRM"], ¶ 44 (recognizing that the industry standard was pending ballot comments); see also FCC NPRM Comments of TIA, filed December 12, 1997, at 6 (advising Commission that TIA had approved and published J-STD-025 as TIA interim standard).

does not include certain enhanced surveillance functionality that law enforcement deems important.³

On March 27, 1998, the FBI challenged the industry standard as "deficient" by filing a petition with the Commission under Section 107(b). Further, privacy advocates filed a deficiency petition on March 25, 1998, claiming that the existing industry standard goes too far in providing law enforcement certain capabilities and fails to protect the privacy of communications not authorized to be intercepted.

The Commission now must establish by rule, on the record and with public comment, the technical requirements or standards necessary to implement the assistance capability requirements of CALEA. 47 U.S.C. § 1006(b). With the industry standard now in a de jure limbo, the development of CALEA-compliant technology must await the outcome of the Commission's proceedings.⁴

As the Commission knows, and as the FBI itself has recognized, the ordinary development cycle for hardware and

³ See FCC NPRM Comments of FBI, filed December 12, 1997, at 37-38.

⁴ It is not the purpose of this petition to comment on the FBI's deficiency petition. Petitioners recognize that the Commission may provide a reasonable time and conditions for compliance with and the transition to any new standard as part of that rulemaking. 47 U.S.C. § 1006(b)(5). Petitioners believe that, at a minimum, the extension requested in this Petition should be granted, but reserve the right to seek a longer period of time based

software is 24 months after promulgation of a standard.⁵ There is no dispute that the standardized delivery of electronic surveillance information is critical to the efficient implementation of CALEA. Indeed, law enforcement itself depends on the development and implementation of a standard to develop its collection equipment necessary to receive surveillance information from carriers.⁶ Accordingly, the absence of a stable standard ensures delay in the delivery of CALEA-compliant technology and underscores the need for an extension of the compliance date.

C. Commission Procedures for Extension

In the FCC NPRM, the Commission stated that October 24, 1998 is the last day by which an extension may be sought and that the Commission may grant an extension of time until

on the complexity of, or any additions to, the industry standard as a result of the deficiency petition rulemaking.

⁵ See FCC NPRM Comments of TIA, at 9 ("Standard industry practice requires 24-30 months of development before manufacturers can even release a software package containing new features."); see also Department of Justice Communications Assistance for Law Enforcement Act Implementation Report to Congress, January 26, 1998, cited in FCC NPRM Reply Comments of Cellular Telecommunications Industry Association ("CTIA"), Attachment D.

⁶ It is the understanding of Petitioners that no contracts have been let by the FBI for the development of collection equipment. Thus, even if a carrier was poised to deliver electronic surveillance information consistent with the industry standard or as enhanced by the FBI punch list, law enforcement would not be able to receive it. This further supports the validity of an extension.

October 24, 2000.⁷ The Commission did not promulgate specific rules for submitting requests, but proposed to permit carriers to petition the Commission for an extension on the basis of criteria specified in Section 109 to determine whether it is reasonably achievable for the petitioning carrier to comply.⁸

In its initial and reply comments to the Commission, AWS suggested that the proper criteria for approving a carrier's extension request is a showing that the technology necessary for compliance is not commercially available.⁹ That is the Section 107 test for an extension.¹⁰ No other test should be applied to this petition. The Commission has not promulgated any other rules or guidance for an extension under CALEA.

II. APPLICABLE LAW

A. Petition for Extension

Section 107 of CALEA provides that a telecommunications carrier proposing to install or deploy, or having installed or deployed, any equipment, facility, or service prior to the

⁷ See In the Matter of Communications Assistance for Law Enforcement Act, Notice of Proposed Rulemaking, CC Docket No. 97-213, FCC 97-356, released October 10, 1997, ¶ 49.

⁸ Id., ¶ 50.

⁹ See FCC NPRM Comments of AT&T Corp., filed December 12, 1997, at 24; and FCC NPRM Reply Comments of AT&T Corp., filed February 11, 1998, at 10.

effective date of Section 103 of CALEA may petition the Commission for one or more extensions of the deadline for complying with the assistance capability requirements of CALEA. 47 U.S.C. § 1006(c)(1). On its face, Section 107 petitions apply to "new" equipment, facilities and services that are not subject to government reimbursement; that is, equipment, facilities or services installed or deployed after January 1, 1995.¹¹

The FBI has defined "installed or deployed" as follows:

Installed or deployed means that, on a specific switching system, equipment, facilities, or services are operable and available for use by the carrier's customers.¹²

Under this definition, a significant amount of AWS's current network was installed or deployed after January 1, 1995.¹³ Further, AWS continues to install equipment, facilities and

¹⁰ Of course, the reasonable achievability test may be relevant once the price of CALEA-compliant hardware and software is known.

¹¹ See 47 U.S.C. § 1006(c)(4) ("An extension under this subsection shall apply to only that part of the carrier's business on which the new equipment, facility, or service is used.") (emphasis added). Any equipment, services or facilities installed or deployed prior to January 1, 1995, is deemed to be in compliance with the assistance capability requirements of CALEA until the Attorney General agrees to reimburse carriers for the costs of retrofitting. See 47 U.S.C. § 1008(b).

¹² See 28 C.F.R. § 100.10.

¹³ Neither AWS nor the telecommunications industry agree with the FBI definition of "installed or deployed."

services throughout its service areas. CALEA-compliant solutions for equipment, services or facilities installed or deployed, or proposed to be installed or deployed, during the compliance period simply are not available.

B. Grounds for Extension

Section 107(c) of CALEA provides the following grounds for granting an extension:

The Commission may, after consultation with the Attorney General, grant an extension under this subsection, if the Commission determines that compliance with the assistance capability requirements under section 103 is not reasonably achievable through application of technology available within the compliance period.

47 U.S.C. § 1006(c) (emphasis added). As noted above, neither of AWS's primary vendors will have CALEA-compliant technology available within the compliance period or for up to two years thereafter.

As the Commission no doubt understands, manufacturers have not been idle. However, further proceeding with current development in the face of the unstable industry standard would expose the vendors to potentially enormous expense of money and engineering resources because any modification to the existing industry standard could require significant changes in Lucent's or Ericsson's individual CALEA solution. Given the current stage of development, both Lucent and Ericsson will soon reach a "point of no return" whereby development commitments toward the existing standard will

become irreversible. Thus, AWS and its vendors require an immediate response to this extension request.

C. Length of Extension

Section 107 provides that the Commission shall extend the compliance date for the lesser of two years after the date on which the extension is granted or the period the Commission finds is necessary for the carrier to comply. There is no dispute, even with the FBI, that it takes up to 2 years to develop technology to an industry standard. Carriers then need time to field test and deploy the technology. Thus, 2 years may not be enough time to meet the assistance capability requirements of CALEA and further extensions may be necessary.

Accordingly, AWS, Lucent and Ericsson request that the Commission grant the extension, effective October 25, 1998, for the full 2-year period.

D. Conditions for Extension

AWS, Lucent and Ericsson have a statutory obligation under Section 106 of CALEA to continue to consult and cooperate to ensure that CALEA-compliant hardware and software will be available on a reasonably timely basis and at a reasonable charge. No other terms or conditions are necessary or appropriate in granting this petition.¹⁴

¹⁴ Petitioners do not believe that the Commission should, or is empowered to, impose other terms or conditions on this extension. Section 107(b), unlike an extension petition under subsection (c),

E. Obligations Pending Ruling - Tolling

Section 108 of CALEA permits the Attorney General to seek an order in federal district court to enforce CALEA. 47 U.S.C. § 1007. CALEA authorizes penalties of \$10,000 per day per violation. 18 U.S.C. § 2522. Further, standing alone, and without an extension from the Commission or other relief, the absence of a stable standard does not relieve Petitioners from their obligations under CALEA. 47 U.S.C. § 1006(a)(3)(B). Thus, if the Commission fails to act on this petition by October 25, 1998, Petitioners could be subject to an enforcement action even though this extension petition was more than timely filed.

Accordingly, Petitioners request that the Commission expressly toll the CALEA compliance date during the pendency of this petition in the event that the Commission requires longer than the remaining time in the compliance period to decide this matter. Further, if the petition is denied, Petitioners request that the Commission grant a reasonable period of time thereafter to permit Petitioners to comply with the Commission's decision.

explicitly authorizes the Commission to provide a reasonable time and conditions for compliance with and the transition to any new standard, including defining the carrier's obligations under Section 103 during the transition to a new standard. No such authority is granted to the Commission under the provisions of CALEA pursuant to which this extension is sought.

F. Petition Procedures

CALEA does not specify the nature of the Commission's consultation with the FBI under Section 107. However, Congress made clear that accountability was to be the hallmark of CALEA, stating that "all proceedings before the FCC will be subject to public scrutiny, as well as congressional oversight and judicial review."¹⁵ Thus, the Commission's consultation with the Attorney General must be on the record.¹⁶

¹⁵ See House Report No. 103-827 at 20, reprinted in 1994 U.S.C.C.A.N 3489, 3500 (emphasis added).

¹⁶ This petition is not based on proprietary or confidential information. There is no reason, therefore, to conduct a closed or restricted proceeding.

III. CONCLUSION

For all of the reasons set forth above, AWS, Lucent and Ericsson request that the Commission grant a two-year extension of the CALEA compliance date to October 24, 2000, effective October 25, 1998.

Dated: March 30, 1998.

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